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No.99-1627

In The

SUPREME COURT OF THE UNITED STATES

Emil and Gabriela Botezatu,

Petitioners,

v.

Immigration and Naturalization Service, et. al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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Contrary to Respondents' suggestion, the court below incorrectly determined that Petitioners' procedural due process claims are subject to the jurisdiction-stripping provisions of § 242(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(g) ("§ 1252(g)"), as interpreted by this Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S.

471 (1999) ("*AADC*"), and, in so holding, rendered a decision in direct conflict with the rulings of nine other courts of appeals.

Respondents argue that § 1252(g) applies to this case because "Petitioner seeks to prevent the execution of his deportation order by arguing that the INS erred in denying him a form of relief from such execution, such as a stay, voluntary departure, or humanitarian parole, all of which reside in the Attorney General's discretion" and "[i]n denying petitioner those forms of relief, the INS in effect made a decision to execute his removal order." Brief in Opposition at 8. But, as this Court recognized in *AADC*, § 1252(g) is "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." 525 U.S. at 486 n.9. Petitioners' procedural due process claims do not challenge the manner in which the Attorney General exercised her prosecutorial discretion in this case – they do not challenge the substance of the decision to deny a stay of deportation, voluntary departure, or humanitarian parole. Rather, they challenge the procedures used in making those decisions: the failure to accord Petitioners any type of hearing even though deporting Mr. Botezatu undermines family unity by separating a married couple (since Mrs. Botezatu was granted asylum because returning to Romania is dangerous for her);[1] the Chicago District

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[1] Respondents try to minimize Mrs. Botezatu's interest in this case, Brief in Opposition at 2 n.2, but she has never been given any type of hearing – even though the INS is threatening to break up her marriage. Although Petitioners were not formally married until after an immigration judge denied Mr. Botezatu's asylum application (because they listened to erroneous advice they received from someone

Office's practice of denying voluntary departure in order to discourage asylum applicants from pursuing appeals; and its policy of automatically denying stays of deportation without any consideration whatsoever except for those based on serious medical reasons. Thus, Petitioners have not asked the courts to grant their requests on the merits or to find that the Attorney General abused her prosecutorial discretion in denying those requests, but merely to require Respondents to afford them procedural due process in considering those requests. *Cf. Walters v. Reno*, 145 F.3d 1032, 1052 (CA9 1998), *cert. denied*, 526 U.S. 1008 (1999) (rejecting the government's contention that § 1252(g) deprives the courts of jurisdiction to "order any relief that interferes with its attempt to execute deportation orders" and finding § 1252(g) inapplicable to procedural due process claim because "[a]lthough the constitutional violations ultimately may have led to the plaintiffs' erroneous deportation, the resulting removal orders were simply a consequence of the violations, not the basis of the claims" and "if the plaintiffs prevail on their claims, they will not be entitled to any substantive benefits" but only "to reopen their proceedings").[2]

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assisting them with their asylum requests), they have a long-standing relationship, having come to this country together and having lived together for the past twelve years. *See* Pet. App. at 43-45.

[2] Likewise, this case does not implicate § 1252(g)'s policy of discouraging "the deconstruction, fragmentation, and hence prolongation of removal proceedings." *AADC*, 525 U.S. at 487. Contrary to Respondents' suggestion, Mr. Botezatu is not seeking a "*second* hearing to adjudicate his requests for a discretionary stay of deportation, reinstatement of voluntary departure, and humanitarian parole." Brief in

The interpretation of § 1252(g) adopted by the court below and endorsed by Respondents – that the federal courts are deprived of jurisdiction whenever an alien's claims "'aris[e] from' the final order of deportation" or "arise out of the decision of the Attorney General to 'execute' [a] removal order," Brief in Opposition at 6, 7 (quoting the district court and court of appeals opinions below) – is in direct conflict with *AADC*'s explicit rejection of the contention that § 1252(g)'s "mention of three discrete events along the road to deportation was a shorthand way of referring to *all claims arising from deportation proceedings*." 525 U.S. at 482 (emphasis added). If § 1252(g) is deemed to apply whenever the *effect* of a claim is to prevent a deportation or delay the execution of a removal order, then – contrary to this Court's "narrow reading" of the statute in *AADC* – the provision no longer "applies only to three discrete actions," but has become "a sort of 'zipper' clause" that "covers the universe of deportation claims." *Id.* at 487, 482.[3]

Opposition at 14 (emphasis added). No hearing has *ever* been held on his constitutional challenges to the procedures used by the INS in denying these requests – decisions that were made *after* his deportation hearing – and thus the decision below does raise the "'serious constitutional question'" whether Congress has the power to "deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

[3] Contrary to Respondents' suggestion, *AADC*'s rejection of the selective prosecution claims raised in that case does not

Respondents claim that "[n]othing in the text of Section 1252(g) or this Court's decision in *AADC* suggests ... that Section 1252(g) is limited to 'substantive' as opposed to 'procedural' challenges." Brief in Opposition at 10. But this distinction between substantive and procedural challenges is precisely the one that has been adopted by a number of other courts of appeals. *See* Petition at 14-17. Respondents' efforts to distinguish those decisions – and thereby to minimize the conflict between the decision below and the rulings of other courts – are unpersuasive.

First, Respondents attempt to distinguish some of the decisions cited in the Petition on the grounds that, unlike this case, they involve challenges to a final order of deportation. Brief in Opposition at 11-12. But Respondents' argument that challenges to final orders of deportation are entitled to special treatment is reminiscent of the Attorney General's contention in *AADC* -- which this Court rejected – that § 1252(g) is "'a channeling provision, requiring aliens to bring

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undermine Petitioners' argument. Brief in Opposition at 10 n.9. The *AADC* plaintiffs' assertion that they were "target[ed] for deportation because of their affiliation with a politically unpopular group" was a "challenge to the Attorney General's decision to 'commence proceedings' against them" and thus, this Court held, "falls squarely within" the express language of § 1252(g). 525 U.S. at 472, 487. Petitioners, by contrast, do not challenge the Attorney General's decision to "commence proceedings" against them, but rather the procedures used in denying them certain remedies after Mr. Botezatu's deportation hearing.

all deportation-related claims in the context of a petition for review of a final order of deportation." 525 U.S. at 478.

Second, Respondents endeavor to distinguish other cases cited in the Petition on the grounds that they involve class actions. Brief in Opposition at 13 n.12. But there is no mention of that fact in two of those cases, and therefore no indication that it had any bearing on the courts' conclusion that § 1252(g) did not apply in those cases. *See Walters v. Reno*, 145 F.3d 1032, 1052 (CA9 1998), *cert. denied*, 526 U.S. 1008 (1999) (finding § 1252(g) inapplicable because the plaintiffs' "objective was not to obtain judicial review of the merits of their INS proceedings, but rather to enforce their constitutional rights to due process in the context of those proceedings"); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (CA9 1999) (same).[4]

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[4] Although the court in the third case, *Tefel v. Reno*, 180 F.3d 1286 (CA11 1999), *cert. denied*, 2000 U.S. Lexis 4002 (June 12, 2000), does mention that the suit involved a "class-wide challenge[] to INS practices," its description of the case as one that did not claim that the INS should have granted relief on the merits to any particular alien but instead "assert[ed] 'a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens'" is equally accurate with respect to Petitioners' procedural due process claims in this case. *Id.* at 1297. Although Petitioners' suit was not filed as a class action, it challenges the INS's general policies and procedures in dealing with requests for stays of deportation, voluntary departure, and humanitarian parole, rather than the substance of the decision rendered in Petitioners' particular case.

Finally, Respondents' various efforts to distinguish the Fourth and Sixth Circuit opinions cited in the Petition are equally unavailing. Just as in *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017 (CA6 1999), where the court refused to apply § 1252(g) to bar the plaintiffs' claim that their attorney's ineffective assistance in presenting their asylum request denied them due process, a finding that Petitioners are challenging the Attorney General's decision to "execute [a] removal order" within the terms of § 1252(g) "confuses the substance of [their] claim with the remedy requested." *Id.* at 1023. Petitioners "are not claiming that the Attorney General should grant them discretionary, deferred-action-type relief" on the merits, but are simply challenging the constitutionality of the procedures used in acting on requests for stays of deportation, voluntary departure, and humanitarian parole. *Id.* at 1022. Like the plaintiff in *Selgeka v. Carroll*, 184 F.3d 337 (CA4 1999), Petitioners are challenging deficiencies in the procedures used by the INS and not "the Attorney General's authority to adjudicate cases," *id.* at 342; as in *Selgeka*, they do "not contest that 'the Attorney General, through its designee, the BIA, [would] eventually adjudicate [their] case.'" Brief in Opposition at 13 (quoting *Selgeka*, 184 F.3d at 342). Under the court's reasoning in *Zhislin v. Reno*, 195 F.3d 810 (CA6 1999), Petitioners' claims would not be jurisdictionally barred "even though they arise from deportation proceedings" because they involve "no challenge ... to the Justice Department's discretion to prosecute." *Id.* at 813, 814. And finally, this case is similar to *Stewart v. INS*, 181 F.3d 587 (CA4 1999), where the court refused to apply § 1252(g) to bar claims filed by an alien who was denied asylum and who then wanted to challenge the BIA's denial of her motion to reopen the deportation proceedings – not on

the merits, but because she had stayed in this country beyond her voluntary departure date.[5]

Respondents rely on another Fourth Circuit decision, *Mapoy v. Carroll*, 185 F.3d 224 (CA4 1999), *cert. denied*, 120 S. Ct. 1417 (2000), to support their contention that the opinion below is consistent with rulings issued by other courts. Brief in Opposition at 10-11. But there is no indication in the Fourth Circuit's opinion that Mapoy's challenge to the BIA's denial of a stay of deportation was anything other than a challenge to the merits of that decision, as opposed to the procedures used in reaching that decision. Thus, there is no indication that the Fourth Circuit has retreated from the position it took in *Selgeka* and *Stewart*, which are not even cited in *Mapoy*.[6]

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[5] The Brief in Opposition mentions several times that Petitioners failed to seek an extension of Mr. Botezatu's voluntary departure date. Brief in Opposition at 3-4. But Petitioners' complaint alleged that "[t]he Chicago District Office of the INS does not have a consistent policy on extending or reinstating voluntary departure during a Seventh Circuit appeal of an asylum case," Pet. App. at 46-47, and if they had been allowed to pursue their claims and conduct discovery, Petitioners would have sought to demonstrate that the Chicago District Office took the position that it had no jurisdiction to extend voluntary departure dates while a Seventh Circuit appeal was pending.

[6] In arguing that there is no conflict among the courts of appeals on this issue, the Brief in Opposition does not even acknowledge the Third Circuit's position that § 1252(g)'s jurisdictional bar is limited to "suits challenging the government's selective enforcement of the immigration laws." *DeSousa v. Reno*, 190 F.3d 175, 182 (CA3 1999).

Because the decision below misinterprets this Court's ruling in *AADC* and conflicts with the rulings of a number of other courts of appeals, Petitioners respectfully request that the Court grant certiorari.

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